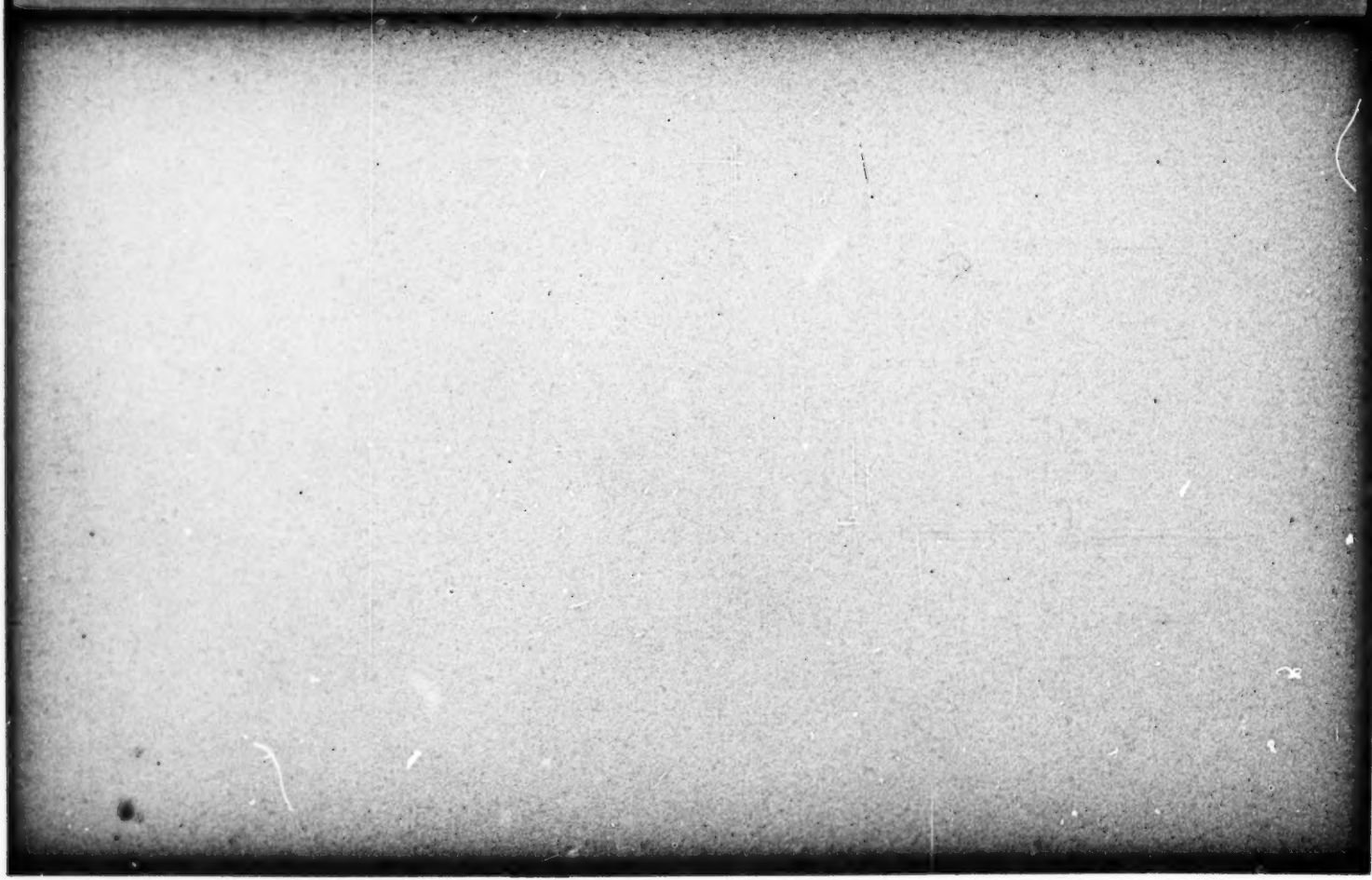

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1126

LOCAL UNION 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND FRANK MATULA, SECRETARY-TREASURER OF LOCAL UNION 396,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LIONEL RICHMAN,
IVAN J. POTTS,
Members of RICHMAN & GARRETT,
A Professional Corporation,
1336 Wilshire Boulevard,
2nd Floor,
Los Angeles, Calif. 90017,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 5

I.

In the Absence of a Finding of Probable Merit to the Grievance, It Is Improper to Order Arbitration When the Grievance Machinery Itself Has Not Been Exhausted 5

II.

In the Absence of a Finding of Merit in the Grievance, It Is an Abuse of Discretion to Order It to Arbitration 7

III.

The Court of Appeals Cannot Supply an Administrative Finding Which the Administrative Agency Itself Has Not Made 9

Conclusion 11

Appendix. Opinion of the United States Court of Appeals for the Ninth Circuit .....App. p. 1

Decision and Order 8

Decision 11

Order 38

Excerpt 40

TABLE OF AUTHORITIES CITED

Cases	Page
American Power Company v. Securities and Exchange Commission, 329 U.S. 90	9
Carpenters Local 60 v. NLRB, 365 U.S. 651	8
Local 485 (IUE) (Automotive Plating Corporation), 170 NLRB 1234	5
Local 703 (IBT) Dominick's Finer Foods, 188 NLRB 873	5
Mastro Plastics v. NLRB, 350 U.S. 270	7
Midwest Regional Joint Board Amalgamated Clothing Workers (Anton Mfg. Co.), 171 NLRB 641	5
NLRB v. C & C Plywood Corp., 382 U.S. 421	7
NLRB v. Food Store Employees Union Local 347, ... U.S. ...., 40 L. ed. 2d 612	9
NLRB v. 485 (CA 2), 454 F. 2d 17	6
NLRB v. George E. Light Boat Storage Inc. (CA 5), 373 F. 2d 762	7
NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438	10
Phelps Dodge Corp. v. NLRB, 313 U.S. 177	9
Port Drum Company, 170 NLRB 555	6
Steelworkers Local 937 (Magma Copper Co.), 200 NLRB 30	5

Statutes	
Labor Management Relations Act, Sec. 8(b)(1)(A)	3, 4, 7
Labor Management Relations Act, Sec. 10(c)	8
Labor Management Relations Act, Sec. 10(f)	2, 3
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 29, Sec. 160(f)	2

IN THE

Supreme Court of the United States

October Term, 1974
No. .....

LOCAL UNION 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND FRANK MATULA, SECRETARY-TREASURER OF LOCAL UNION 396,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Frank Matula, Secretary-Treasurer of Local Union 396, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 22, 1975.

Opinions Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit, the Decision of the National Labor Relations Board, and the Decision of the Administrative Law Judge appear in the appendix hereto. The Administrative Law Judge found that the petitioner committed unfair labor practices. The National

Labor Relations Board agreed and imposed, in part, as a remedy, an order that the Union pay counsel fees that may be incurred in the employees' retention of independent counsel to represent them in an arbitration. The Court of Appeals affirmed the Order of the National Labor Relations Board, in part, remanding the case to the NLRB for reconsideration as to whether the circumstances sustained the Board's order compelling the payment of *attorneys'* fees as opposed to fees for a paraprofessional and the feasibility of payment of fees for a single attorney or a single paraprofessional to represent all of the aggrieved employees if their grievances were identical.

Jurisdiction.

The Judgment of the Court of Appeals was entered on January 22, 1975. This court has jurisdiction under 28 U.S.C. Section 1254(1). The Court of Appeals took jurisdiction under Section 10(f) of the Labor Management Relations Act (29 U.S.C. 160(f)).

Questions Presented.

1. May the NLRB order arbitration of a grievance, based solely on evidence of hostility between the grievant and a union representative without an evidentiary finding of the probable merit of the grievance?

2. May the NLRB find a breach of duty of fair representation in failing to process a grievance based solely upon evidence of hostility between a union representative and a grievant without a finding of merit in the grievance?

3. May the Court of Appeals make a finding based upon its interpretation of the contract that merit exists in a grievance when the NLRB has neglected and refused to make such a contractual interpretation?

Statutory Provisions Involved.

Sections 8(b)(1)(A) and 10(f) of the Labor Management Relations Act are fully set out in the appendix.

Statement of the Case.

United Parcel Service (company) is engaged in the delivery of small parcels to homes and businesses. It also operates an air freight and messenger service. It divides its operations into regions; the area covered by the collective bargaining agreement involved herein is within the company's Pacific Region and includes several western states and is a multi-local union contract.

Regions are further broken down into districts, districts are broken down into divisions, and divisions are broken down into separately supervised operating centers.

The company employs two types of drivers, feeder drivers and package drivers.

The parties have adhered to an unusually strict departmental/classification seniority system; on transfer, dovetailing of seniority is confined to very rare circumstances.

Since at least 1966, separate seniority lists have been maintained with respect to package drivers, by package centers; inside employees, by operating center. The operation of this system is stringent and is carried out without regard to local union membership of the employee.

In the 1970-72 collective bargaining agreement, a new seniority system was created. Eight feeder drivers' seniority lists were created, by area, under which feeder drivers were to be treated like package drivers had always been treated. Thus, each year, bidding would

occur with feeder drivers being limited to bidding within their respective areas or, in other words, within their respective seniority list.

In 1970, the company advised the Union that for reasons of economy it had decided to change certain feeder runs and move them from Santa Barbara and San Bernardino to Los Angeles. The charging party and his supporters had had these runs in Santa Barbara and San Bernardino. Some of these runs were moved in November, 1971, and the rest in January, 1972.

The company testified that, without contradiction, it was its interpretation of the labor contract that the drivers in Santa Barbara should be fired because of the strict seniority system. Petitioner, Matula, persuaded the company that these were good men and that the company should find work for them in Los Angeles. The company agreed. They were added to the seniority list in Los Angeles.

Thereafter, objecting to their being "endtailed", the Santa Barbara drivers filed a grievance with the union alleging they had been denied their proper seniority.

The Board found that Local 396 and Matula, in violation of Section 8(b)(1)(A), denied the transferees the same representation accorded other employees within the Local's jurisdiction because the transferees were not members of Local 396 and because they invoked the processes of the Board.

As indicated, the Board directed the Union to pay attorneys' fees for the expense of the arbitration of the grievances as well as the usual remedial order.

REASONS FOR GRANTING THE WRIT.

I.

In the Absence of a Finding of Probable Merit to the Grievance, It Is Improper to Order Arbitration When the Grievance Machinery Itself Has Not Been Exhausted.

The procedure which the Board has followed in the instant case is directly contrary to a long line of Labor Board precedent. With unanimity, prior Board decisions have held that where the union, for invidious reasons, has refused to proceed with a grievance, the appropriate remedy is to direct the union to proceed with that grievance.[1]

In *Local 485, IUE,* the Board found a violation similar to that before the court.[2]

The union refused to process a grievance of an employee because of personal antipathy between the employees and the union representative. The Board, in its order, directed the union to resume the grievance process, and, "if *necessary,* take the case to arbitration . . ." (emphasis added). The Board retained jurisdiction to monitor the grievance proceedings to determine if its mandate was complied with. It placed no limitations upon the identity of the participants in the arbitration. In specifically overruling the Trial Exam-

---

[1]A complaint alleging that a union refused to process grievances of employees because they had filed charges with the National Labor Relations Board has inevitably called for an order requiring the union to process the grievances in accordance with the collective bargaining agreement. *Local 703 (IBT) Dominick's Finer Foods,* 188 NLRB 873; *Midwest Regional Joint Board Amalgamated Clothing Workers (Anton Mfg. Co.),* 171 NLRB 641; *Steelworkers Local 937 (Magma Copper Co.),* 200 NLRB 40.

[2]*Local 485 (IUE) (Automotive Plating Corporation),* 170 NLRB 1234.

iner on this score, the Board relied upon its prior decision in *Port Drum Company* in which it said:[3]

> "We do not, however, adopt the Trial Examiner's recommendation that Jake Antilley and Harry Burk be disqualified from taking part in the arbitration proceeding, for there is no indication at this point that Respondent Union or its officers and the representative will fail to carry out our mandate that they take Carver's grievance to arbitration and cease discriminating in their representation of him because of his lack of union membership. On the other hand, we are mindful of the Union's prior conduct in this matter and of the possibility that Carver may have suffered irreparable damages because of the Union's unlawful conduct. Rather than adopt Section 8 of the Trial Examiner's Recommended Order and attempt at this point to anticipate what damages, if any, Carver may suffer or has suffered by virtue of the Union's failure to arbitrate his case, we shall retain jurisdiction in this matter and, may, upon timely motion of the General Counsel or Charging Party, reopen this proceeding for a determination of this question."

The Local 485 decision was reviewed by the Second Circuit which refused to enforce a supplemental order of the Board, leaving the determination of whether or not the discharge was proper to the grievance process.[4]

Under these circumstances, the disqualification of the union to handle the grievance machinery is an invidious and punitive usurpation of the union's rights

---

[3]*Port Drum Company*, 170 NLRB 555.

[4]*NLRB v. 485* (CA 2), 454 F. 2d 17.

under the contract. A personal antipathy between one union representative and the grievants would certainly not disqualify the remaining union representatives and their legal staff from adequately processing the grievance to the point where it could determine whether or not the grievance should be arbitrated and, if so, from arbitrating.

II.

In the Absence of a Finding of Merit in the Grievance, It Is an Abuse of Discretion to Order It to Arbitration.

Petitioners do not question the finding of the Board that the statement of petitioner Matula constituted a violation of Section 8(b)(1)(A) of the Act. However, an explosive outburst by a union representative who feels that he has been imposed upon when he had saved the jobs of the grievants, does not automatically convert their grievance as to seniority into a valid grievance.

In determining if unfair labor practices have been committed, or fashioning remedies for unfair labor practices, the NLRB has the power to interpret collective bargaining agreements.[5]

In the instant case, there is, of necessity, a two-step process to justify the type of relief ordered by the Board and sanctioned by the Court of Appeal. There must not only be evidence of a breach of the duty of fair representation, there must also be evidence that the employer breached the collective bargaining agree-

---

[5]*Mastro Plastics v. NLRB*, 350 U.S. 270; *NLRB v. C & C Plywood Corp.*, 382 U.S. 421, 429 (see also, footnote 15); *NLRB v. George E. Light Boat Storage Inc.* (CA 5), 373 F. 2d 762.

ment. While petitioners concede the finding of the Board that the oral outburst is sufficient to show the Union's breach of its duty, they strenuously contend that the Board should be required to establish as a preliminary matter that the contract provisions were violated. Otherwise, the Board, by ordering arbitration, is by-passing the established grievance machinery and is entering a punitive order rather than a remedial order. The Administrative Law Judge, whose findings were sustained by the Board, stated:

> "While the Board may, in passing upon complaints of unfair labor practices, and determining remedies therefor, construe the provisions of collective bargaining contracts, there is here no necessity for the exercise of this function. The gravamen of respondents' offense is their failure and refusal, for unlawful reasons, to process the grievance of one group of represented employees. This failure can and must be remedied by resort to the arbitration process."

Petitioners submit that there is absolutely no justification for the Administrative Law Judge to disregard the grievance machinery, to disregard the question of whether or not there is even merit in the grievance, and order arbitration.

The direction of arbitration, and the direction that the Union pay for independent representation at the arbitration, without regard to the merits of the grievance, is not remedial but punitive, and beyond the jurisdiction of the Board under Section 10(c) of the Act.[6]

---

[6]*Carpenters Local 60 v. NLRB*, 365 U.S. 651.

III.

The Court of Appeals Cannot Supply an Administrative Finding Which the Administrative Agency Itself Has Not Made.

It is a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedies of policy is peculiarly a matter for administrative competence.' "[7]

As we have indicated, *supra,* the Board refused to consider the terms of the collective bargaining agreement, finding there was "no necessity for the exercise of this function." The Court of Appeals, apparently recognizing the fatal defect of this failure to warrant the type of remedy proposed, proceeded itself to interpret Section 11 of the 1970-72 labor agreement and determined from this interpretation that the Board's conclusion that the grievances were plausible was supported by the record.

We submit that the Court had no power to do what the Board failed to do. Appropriately, enforcement should have been reviewed and the matter remanded to the Board for reconsideration as to whether the contract, as interpreted, indicated that the grievances were plausible.

---

[7] *American Power Company v. Securities and Exchange Commission,* 329 U.S. 90, 112; *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194; *NLRB v. Food Store Employees Union Local 347,* .... U.S. ...., 40 L. ed. 2d 612.

Conclusion.

For all the above reasons, and especially in light of this Court's decision requiring the Board to articulate reasons for deviating from past precedent,[8] petitioners pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LIONEL RICHMAN,
IVAN J. POTTS,
Members of RICHMAN & GARRETT,
A Professional Corporation,
Attorneys for Petitioners.

[8]*NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Frank Matula, Secretary-Treasurer of Local Union 396, Respondents. No. 73-2451.

[January 22, 1975]

On Application for Enforcement of an Order of The National Labor Relations Board.

Before: CARTER and HUFSTEDLER, Circuit Judges, and SCHNACKE, District Judge.*

HUFSTEDLER, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order (1) requiring Local 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [the "Union"] and its Secretary-Treasurer, Matula, to cease specified violations of section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. § 158(b)(1)(A)), (2) directing the Union to proceed promptly to arbitration over the grievances of nine employees in respect of the seniority dates assigned to each, (3) permitting the aggrieved employees to retain counsel independent of the Union to represent them in the arbitration, and (4) requiring the Union to pay the employees' counsel

*Honorable Robert H. Schnacke, Northern District of California, sitting by designation.

fees. The Union and Matula resist enforcement contending that (1) the evidence was inadequate to sustain the Board's determination that they breached their duty of fair representation to the named employees, (2) arbitration is inappropriate because the employees' seniority grievances have no colorable merit, and (3) no substantial basis exists to support the requirement that the Union pay the employees' legal fees.

The employees involved here are "feeder drivers" for United Parcel Service [the "Company"], which delivers packages and merchandise for stores and other businesses. Feeder drivers transport packages in bulk from feeder centers to package centers, or hubs, where "package drivers" pick up the packages in smaller quantities and deliver them to their ultimate destinations. The Company divides its operations into geographical regions and districts. The region involved in this case consists of two districts: "Metro L.A.," encompassing most of Los Angeles County, and "South Calif.," embracing Southern California, other than Los Angeles County, and parts of Nevada and Arizona. The employees in both districts are represented as a single bargaining unit, but under the terms of the regional labor agreements in force during 1968-72, each local within the region administered the contract and handled grievances within its own territorial jurisdiction. Local 396's territory corresponds roughly with the Metro L.A. district.

Prior to the 1970-72 labor agreement, one seniority list was maintained for all feeder drivers in the region. No adjustments in seniority were necessary when a feeder driver was transferred from one district to another or the driver bid successfully for any run in the region. This system changed under the 1970-72 labor

agreement; eight separate feeder driver seniority lists were created for different geographical areas within the region. Thus, one feeder driver seniority list was maintained for feeder drivers located in Los Angeles and another for those located in Santa Barbara.

The grievances of the nine feeder drivers involved here arose when, after the Company shut down its Santa Barbara facility, the drivers transferred to the Metro L.A. district and were "endtailed" (placed at the bottom of the Metro L.A. feeder driver seniority list) instead of being "dovetailed" (given the seniority they would have enjoyed if a single, region-wide list had been maintained continuously). The transferees filed a grievance report with Local 396 alleging that they were denied their proper seniority in bidding the posted runs and asking for full seniority, based on dovetailing, and back pay. Local 396 refused to process the grievances. The Board found that Local 396 and Matula, in violation of section 8(b)(1)(A), denied the transferees the same representation accorded other employees within the Local's jurisdiction because the transferees were not members of Local 396 and because they invoked the processes of the Board. The Board's findings are fully supported by the record.

In apparent recognition of the futility of quarreling with the record, the Union and Matula do not press resistance to the cease-and-desist order. Their attack is focused on those portions of the Board's order involving arbitration. They argue that under the terms of the 1970-72 labor agreement, the aggrieved employees have no plausible seniority claim; therefore, the Union's failure to process the grievances was not a breach of its duty of fair representation, and even if the failure

were a breach, requiring arbitration of frivolous claims is an unwarranted exercise of the Board's remedial powers.

The crisp disposition of the Union's contentions is that the grievances were not frivolous. The question whether these employees were entitled to be dovetailed turns on the construction and application of some ambiguous provisions of the 1970-72 labor agreement. Section 11 of the agreement provides:

> "Feeder Drivers. It is agreed that there shall be a separate seniority list for regular feeder drivers, and those employees presently employed as regular feeder drivers shall retain their seniority in this classification. When additional openings occur in this classification, these may be filled by employees from the bargaining unit who qualify for this work, but these employees shall be placed at the bottom of the feeder driver seniority list. *In the event of a reduction in force, feeder drivers may return to their former position and retain their full seniority.* Employees desiring to qualify for feeder driver work shall indicate this desire. The names of those employees who are qualified by the Company for feeder driver work shall be placed on a list in seniority order. All vacancies in this classification shall be filled from this list. * * *" (Emphasis added.)

Transfer of these employees was due to "a reduction in force"; therefore, they "may return to their former position and retain their full seniority." The definition of "former position," in the light of the history of the development of seniority lists for feeder drivers in the region, and the proper application of the

correct standard to the differing employment histories of the drivers are far from clear. The development of multiple feeder driver seniority lists from the single list system, the negotiations preceding the 1970-72 contract, and the conduct of the Company and the Union under the contract unequivocally foreclosed dovetailing of transferred employees. The Board's conclusion that the grievances were plausible is supported by the record.

The record also sustains the Board's determination that arbitration was an appropriate means of resolving conflicting interpretations of the labor agreement and of securing the impartial resolution of the merits of the grievances. The order to arbitrate was well within the Board's remedial discretion. (*See Local Union No. 12, United Rubber, C., L. & P. Wkrs. v. N.L.R.B.* (5th Cir. 1966), 368 F.2d 12, 24-25; *Cf. Humphrey v. Moore* (1964), 375 U.S. 335, 349-51.)[1]

The novel issue presented here is the propriety of the Board's order requiring the Union to pay the legal fees that may be incurred in the employees' retention of independent counsel to represent them in the arbitration.[2] The Union concedes that if the order to arbitrate is upheld, the aggrieved employees have a right to independent representation. The Union's sticking

---

[1]Conceivably these aggrieved employees are not confined to arbitration as a means of redress. An aggrieved employee may seek "judicial enforcement of his contractual rights [where] the union has sole power to invoke . . . the grievance procedure, and if . . . the employee-plaintiff has been prevented from invoking his contractual remedies by the union's *wrongful* refusal to process the grievances" (Vaca v. Sipes (1967), 386 U.S. 171, 185; emphasis in original).

[2]In this case we are concerned only with legal fees incurred as a consequence of the arbitration proceeding. Our opinion is not addressed to legal expenses of any other kind. (*Cf.* Hall v. Cole (1973), 412 U.S. 1.)

point is that part of the order directing the Union to pay the bill.

The Board's order that the Union pay counsel fees was within the power granted to the Board by the Act. "Congress has vested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action . . . as will effectuate the policies of the Act'" (*N.L.R.B. v. Food Store Employees Union, Local 347, Etc.* (1974), ... U.S. ...., ... [42 U.S.L.W. 4758, 4760]). That discretion includes the grant or denial of litigation expenses and attorneys' fees. (*See N.L.R.B. v. Local 485, Int. U. of Electrical, R. & M. Wkrs.* (2d Cir. 1972), 454 F.2d 17, 22n.9; *International Union of E., R. & M. W., AFL-CIO v. N.L.R.B.* (D.C. Cir. 1970), 426 F.2d 1243, 1253n.15; *cf. N.L.R.B. v. Food Store Employees Union, Local 347, Etc., supra,* .... U.S. .... [42 U.S.L.W. 4758].) A court will not decline to enforce a Board order unless the order is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co. v. N.L.R.B.* (1943), 319 U.S. 533, 540).

One of the policies of the Act is to undo the effects of unfair labor practices by bringing about "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp. v. N.L.R.B.* (1941), 313 U.S. 177, 194; *see also N.L.R.B. v. Rutter-Rex Mfg. Co.* (1969), 396 U.S. 258, 265). If the Union had not violated its duty of fair representation by its discriminatory refusal to process the grievances, the issues would have been resolved by litigation or arbitration in which the aggrieved employees would have enjoyed vigorous representation at no added cost to them-

selves. They cannot be restored to that position unless they are relieved of the expenses they will incur in securing the independent representation to which they are concededly entitled.[3]

Our inquiry, however, does not end with our conclusion that the order compelling the Union to pay counsel fees was within the zone of discretion committed to the Board. The particular order must be scrutinized to enable us to decide whether, in the circumstances of this case, the Board abused its discretion. The aggrieved employees are entitled to the kind of representation that they would have had in processing their grievances but for the Union's unfair labor practices. Would they have been represented by a lawyer, a paraprofessional, or both? If they would not have been represented by a lawyer, is there some other circumstance that sustains the Board's order compelling the payment of *attorneys'* fees as opposed to fees for a paraprofessional? Would it be feasible and in the interest of all concerned to award payment of fees for a single attorney or single paraprofessional to represent all of the aggrieved employees if their grievances are identical? The record before us does not disclose what

---

[3]The propriety of compelling the Union to bear the expenses of independent representation for the aggrieved employees is premised, in this case, on the Union's breach of its duty of fair representation. There may be occasions where such a breach is absent, but where the interests of the union and one or more of its members clash on a particular matter, with the result that the union's plausible interpretation of the applicable labor agreement conflicts with an equally plausible interpretation of an aggrieved member. In such circumstances, it might be unrealistic to expect the union to represent that member, whose interests and interpretation are adverse to the union's own, in arbitration. We do not have to decide today whether, in those circumstances and absent an unfair labor practice, the union could be compelled to pay for the independent representation of the aggrieved employee. (*Cf.* Humphrey v. Moore (1964), 375 U.S. 335, 349-51.)

the facts are that bear on these questions; nor does it otherwise enable us to determine the rationale of the Board in issuing the challenged order. A limited remand to the Board will afford it "the opportunity, through additional evidence or findings, to reframe its order better to effectuate that [national labor] policy" (*N.L.R.B. v. Food Store Employees Union, Local 347, Etc., supra,* .... U.S. at .... [42 U.S.L.W. at 4761]).

The Board's order will be enforced, except that portion thereof directing the Union to pay counsel fees, which is remanded to the Board for further proceedings consistent with the views herein expressed.

Decision and Order.

203 NLRB No. 125
D—7498
Los Angeles, Calif.

United States of America, Before the National Labor Relations Board.

Local Unions Nos. 186, 381, 396, 467, 542, 572, 871, 898, 952 and 982, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Frank Matula, Secretary-Treasurer, Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (United Parcel Service) and Russell H. Breton, an Individual. Case 31—CB—949.

On December 18, 1972, Administrative Law Judge George H. O'Brien issued the attached Decision in this

proceeding. Thereafter, the General Counsel and Respondents Local 396 and Frank Matula filed exceptions and supporting briefs and Respondents Locals 542 and 898 filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[3]

---

[1]The Administrative Law Judge, apparently by inadvertence, failed to make any finding with respect to the status of Respondent Local 572 as a labor organization. The parties stipulated, and we find, that Respondent Local 572 is a labor organization within the meaning of Sec. 2(5) of the Act. We also note that the Administrative Law Judge erroneously refers to a charge filed by Local 186 against the Company as an 8(b)(3) charge. The record clearly discloses, however, that Local 186 filed a charge alleging a violation of Sec. 8(a)(5).

[2]We find it unnecessary to pass on the Administrative Law Judge's reliance on *Miranda Fuel Company, Inc.*, 140 NLRB 181, enforcement denied 326 F.2d 172 (C.A. 2, 1963), in view of his finding that the discrimination against the complainants was based on their nonmembership in Local 396.

[3]In ordering that the complainants be permitted respresentation by counsel of their own choosing at the arbitration proceeding, we decline to impose liability for the reasonable costs thereof upon Frank Matula, and shall require such payment only by the Respondent Union. It is well established policy that the Board will not normally hold a union agent, even where named as an individual respondent, liable for monetary payments. Cf. *International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO (Considine Distributing Co.)*, 166 NLRB 915; *Elmhurst Contracting Co., Inc.*, 141 NLRB 53, 56, fn.5.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Los Angeles, California, its officers, agents, and representatives, and Respondent Frank Matula, Secretary-Treasurer of Local Union 396, shall take the action set forth in the said recommended Order as herein modified:

Delete paragraph 2(b) and substitute the following:

"(b) Permit the above-named feeder drivers to have their own counsel at the arbitration proceeding, the reasonable costs of legal fees therefor to be paid by Respondent Local Union 396 only."

Dated, Washington, D.C. May 22, 1973.

.....
Edward B. Miller, Chairman

.....
Howard Jenkins, Jr., Member

.....
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

Decision.

JD-(SF)-199-72
Los Angeles, Calif.

United States of America, Before the National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

Local Unions Nos. 186, 381, 396, 467, 542, 572, 871, 898, 952 and 982, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Frank Matula, Secretary-Treasurer, Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (United Parcel Service) and Russell Breton, An Individual. Case No. 31-CB-949.

Brian O'Dwyer, Esq., for the General Counsel.

George A. Pappy, Esq., (Brundage, Neyhart, Miller, Ross & Reich) and *Charles K. Hackler, Esq.*, for Respondent Locals 186, 381, 396, 572, 871, 952, 982 and Respondent Frank Matula.

Gerald Goldman, Esq., (Richman and Garrett) for Respondent Local 467.

H. Ronald Domnitz, Esq., (Domnitz and Prochazka) for Respondent Locals 542 and 898.

Statement of the Case

GEORGE H. O'BRIEN, Administrative Law Judge: On September 26 and 27, 1972, a hearing was held in the above entitled matter, in Los Angeles, California. The complaint, issued May 25, 1972, is based on a charge filed February 28, 1972, as amended May 17, 1972, by Russell H. Breton on behalf of himself and eight other individual employees of United Parcel Serv-

ice (UPS). The complaint alleges in material substance that ten Teamster Union Locals, Respondents herein, through their agents, Frank Matula and Carl Lindeman, violated Section 8(b)(1)(A) of the National Labor Relations Act by refusing to process the grievance of nine UPS employees because none was a member of Teamster Local 396, and because all had filed the charge giving rise to the instant proceeding. Respondents' several answers deny the commission of any unfair labor practices.

Upon the entire record[1] in this proceeding, including my observation of the witnesses and after due consideration of the post hearing briefs, I make the following:

Findings of Fact

I. The Business of the Employer

United Parcel Service, herein called UPS, is engaged in the business of delivering small packages, furniture and other merchandise to homes and businesses, for department stores and other customers. Its annual gross volume of business is in excess of $1,000,000. It annually purchases and receives goods and services valued in excess of $50,000 from directly outside the State of California, for use inside the State of California. UPS is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

---

[1]Respondents' post-hearing motion to correct the stenographic transcript is granted.

II. The Labor Organizations Involved

Each of the following named locals of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondents herein, is a labor organization within the meaning of Section 2(5) of the Act:

Local Union No. 186 (Santa Barbara, Calif.)
Local Union No. 381 (Santa Maria, Calif.)
Local Union No. 396 (Los Angeles, Calif.)
Local Union No. 467 (San Bernardino, Calif.)
Local Union No. 542 (San Diego, Calif.)
Local Union No. 871 (Pomona, Calif.)
Local Union No. 898 (El Centro, Calif.)
Local Union No. 952 (Orange, Calif.)
Local Union No. 982 (Lancaster, Calif.)

Frank Matula, Respondent herein, Secretary-Treasurer of Respondent Local 396, is an agent of a labor organization within the meaning of Sections 8(b) and 2(13) of the Act.

III. The Alleged Unfair Labor Practices

A. *Issues*

1. Whether acts, omissions and statements of Frank Matula bind any respondent other than Local 396 and Matula himself.

2. Whether acts, omissions or statements of Matula restrained or coerced employees in the exercise of Section 7 rights.

3. Whether statements of Carl Lindeman, business agent of Local 396, restrained or coerced employees in the exercise of Section 7 rights.

4. Whether Matula owed any duty to UPS employees, Russell Breton and Eugene Saddler, when he conferred with them on February 16, 1972.

5. Whether Matula, in permitting UPS to deprive nine employees of their seniority, and in refusing to process the grievance filed by said employees with Local 396:

(a) Violated his duty, and the duty of all Respondent local unions to represent fairly and impartially, all of the employees in the contractual bargaining unit.

(b) Sought to punish employees because they threatened to file and did file with the National Labor Relations Board, a charge accusing the respondent unions and Matula of unfair labor practices.

(c) Denied representation to said employees, and refused to process their grievance because, at the time UPS revoked their seniority, they were members of Local 186 or 467 and were not members of Local 396.

(d) Believed in good faith that the action of UPS in revoking the seniority of said employees when they were transferred from Santa Barbara and San Bernardino to Los Angeles was required by the terms of the collective bargaining agreement, that the grievance had no merit and that its prosecution would waste the resources of Local 396 in an action foredoomed to failure.

6. Appropriate remedy or remedies, if any.

B. *The Setting*

The Pacific Region of UPS encompasses the states of Washington, Oregon, California, and parts of Idaho, Nevada and Arizona. Prior to July 1969, the Southern California District encompassed all of California south of San Luis Obispo and south of Bakersfield and parts of Nevada and Arizona. Since at least 1940, all non-supervisory employees in the Southern California District (about 2,000) have been represented in a single bargaining unit under a single contract by the ten local unions, Respondents herein, collectively designated as "The Union" in all contracts. All employees in the bargaining unit are required to become and remain members of "The Union" as a condition of employment.[2]

In July 1969, the Southern California District was divided into a Metro Los Angeles District with boundaries which correspond, roughly, to the territorial jurisdiction of Local 396, and a South California District. The division of the Southern California District had no immediate effect upon any of the UPS operations.

UPS maintains 22 Package Centers in its Metro Los Angeles District and 21 Package Centers in its South California District. Each center serves a specific geographical area. Package drivers, operating from each center, make pickups and deliveries in panel trucks. Seniority for layoff and recall is by classification at each center. A package driver transferring from one center to another goes to the bottom of the seniority list.

---

[2]In practice, each employee is required to join the local union having territorial jurisdiction over his work station. Between 1300 and 1400 employees are required to maintain membership in Local 396 as a condition of employment.

The Package Centers are supplied from eight feeder driver locations. All feeder drivers serving the Metro Los Angeles area work out of the Soto Street Hub. Feeder drivers serving the South California District are stationed at seven scattered Package Divisions. Each Package Division serves one or more Package Centers. Feeder drivers operate heavy duty highway tractors, pulling two box trailers. The tractor and trailers have an overall length of 65 feet, and are used for bulk hauling between the Package Divisions. Each feeder driver has a regular prescribed run (feeder path). All have received special training to operate this heavy equipment, and most have been promoted from the ranks of the package drivers.

The contract, effective from November 1, 1966 through October 31, 1968, contains no reference to feeder drivers other than a wage scale for "Tractor-Trailer Drivers". The contract, effective from November 1, 1968 through October 31, 1970, contains the following clause:

> *SECTION 12. Feeder Drivers.* It is agreed that there shall be a separate seniority list for tractor drivers, and those presently employed as tractor drivers shall retain their seniority in this classification. When additional openings occur in this classification, these may be filled by employees from the bargaining unit who qualify for this work, but these employees shall be placed at the bottom of the tractor seniority list. In the event of a reduction in force, tractor drivers may return to their former positions and retain their full sen-

iority. Employees desiring to qualify for tractor work shall indicate this desire. The names of those employees who are qualified by the Company for tractor driver shall be placed on a list in seniority order. All vacancies in this classification shall be filled from this list. They will attend, on their own time, the Company training program which may be established from time to time as the need occurs. The Company agrees to furnish the necessary equipment and instructors. A good driving record is a prerequisite to such training.

* * *

Feeder path openings will be posted for bid among feeder drivers. The rules for bidding shall be as follows:

(a) Feeder path openings will be posted for five (5) days on the bulletin boards at the Company's Soto Street facility and at the Company's Santa Barbara facility. Those desiring to fill such openings shall sign their names on the posted bulletin boards.

(b) Openings will be filled by the Company with the most senior qualified bidding Feeder Driver.

(c) A successful bidder for an opening may not again bid on subsequent openings for a period of six (6) months following his reassignment.

(d) Feeder drivers may bid the original opening and the opening created by the successful bidder. Thereafter, the Manager will make assignments to fill subsequent openings.

In the contract, effective from November 1, 1970 through October 31, 1972, the initial paragraph of Section 12, *supra*, is repeated verbatim, but the bidding rules were radically revised to read:

> Feeder paths will be posted for bid among Feeder Drivers. The rules for bidding shall be as follows:
>
> Local 396 feeder paths will be posted for bid the first week of February 1971, and the first week of February 1972. The feeder driver with the most seniority shall have the first bid. The feeder driver with the second most seniority shall have the second bid and so forth.
>
> The Company shall have the option of placing a member of 396 on all new feeder paths that may be put on between bidding time. This new feeder path, if still in existence, shall be put on the board at bidding time. Feeder drivers in the outlying areas shall bid for feeder paths in their own area.
>
> For example:
>
> San Diego drivers will bid in San Diego.
>
> Santa Barbara drivers will bid in Santa Barbara and so forth.
>
> The Company will post a Feeder Driver seniority list on the board in each area.

The contracts entered into in 1966, 1968 and 1970 contain an identical clause on "Settlement of Controversies" which provides:

> Should a controversy, dispute or disagreement arise . . . each of the parties shall make an earnest attempt to settle all differences, but in the event

> they fail to settle all differences a Board of Arbitration shall be appointed consisting of two (2) representatives of each party hereto and an additional member who shall be a disinterested party. . . . The majority decision of such Board shall be final, binding and conclusive. . . .

There is no time limit on the right of either party to require arbitration of any controversy.

In the negotiations for the contracts of 1968 and 1970, all the signatory locals were represented by Frank Matula, pursuant to written authorizations, of which the following are samples:

> Teamster Local #871 hereby grants power of attorney to Local #396 and the union negotiating committee in regard to the United Parcel Service Negotiations.

> Teamsters Local No. 982 hereby grants to Frank J. Matula, Jr., Secretary-Treasurer of Package & General Utility Drivers Local 396, Power of Attorney to negotiate and sign a contract covering members of Local 982 employed by United Parcel Service.

All contracts were ratified by the membership of all local unions bound thereby in separate meetings.

All powers of attorney expired with the execution of the contract. Each local union represents the employees in its area in grievances arising under the contract.

C. *The Transfer of Feeder Paths and Relocation of Feeder Drivers November 1971 and January 1972*

On the Coast run from Los Angeles to San Francisco, a Santa Barbara driver picked up two trailers at the Soto Hub and pulled them to Santa Barbara. There, a second Santa Barbara driver picked up the trailers and pulled them to Bradley. At Bradley, they were picked up by a San Francisco driver for the remainder of the trip. The Santa Barbara driver returning from Bradley would haul two Los Angeles bound trailers, which another Santa Barbara driver would deliver to the Soto Hub.

When Interstate 5 was opened from a point South of Bakersfield to a point near San Francisco, one of the Los Angeles-San Francisco runs was rerouted. A Los Angeles driver pulled the boxes from the Soto Hub to Kettleman City, where it was turned over to a San Francisco based driver, and the Los Angeles driver returned to Soto Hub with boxes which he received from the San Francisco driver. The change involved the elimination of one job. Dan Dwyer, who was on sick leave at the time, received a paper transfer from Santa Barbara to Los Angeles. Eddie Harrison was physically transferred on November 22, 1971.

On January 24, 1972, five more runs were rerouted from the coast route to the inland route, using Interstate 5, and six or seven men were transferred from Santa Barbara to Los Angeles.

After the rerouting, the work formerly performed by 18 drivers was performed by 12.

Also, in January 1972, the run from Los Angeles to Arizona was changed from a three man to a two man operation.[3]

As of January 24, 1972, twelve jobs had been abolished in Santa Barbara, one job had been abolished in San Bernardino, six jobs had been created in Los Angeles, and the nine drivers, complainants herein, were transferred to Los Angeles. These nine drivers were placed at the bottom of the seniority list by UPS. None was assigned to any of the newly created runs. This deprivation of feeder driver seniority made them more vulnerable to layoff, prevented them from bidding on more lucrative runs, and forced them to take their vacations at inconvenient times.

D. *Sequence of Events*

Paul Montgomery was hired as a package driver on May 15, 1958. On September 16, 1968, he became a feeder driver, working out of the Soto Hub in Los Angeles. In 1970, he was transferred to Costa Mesa, in Orange County. While running a feeder path out of Costa Mesa, he remained a member of Local 396.

In the Spring of 1971, Montgomery was informed by division manager Caldwell that the point of origin would be moved from La Mesa to Carlsbad; that the

---

[3]Of the nine complainants herein, one may have been transferred from San Bernardino to Los Angeles, or all nine may have been transferred from Santa Barbara. The record is unclear on the point.

Westminster feeder driver would be moved to Carlsbad and that Montgomery would no longer have a job. Montgomery telephoned the business agent of Local 396, Carl Lindeman. The following Monday, Montgomery was transferred back to the Soto Hub. When, he asked the Soto manager, Mr. Leon, about seniority, Leon replied that he would go to the bottom of the list. Montgomery then saw Lindeman in person. Lindeman telephoned Ralph Lipscomb, assistant to the UPS District Manager, Charles Buckridge, on May 7, 1971, and asked why Montgomery had not been permitted to bid on either the Carlsbad or Westminster feeder paths. Lipscomb said that he would look into it.

When a revised seniority list was posted at Soto, Montgomery's name appeared at about the Sixteenth position with his original feeder driver seniority date, September 16, 1968.

Eddie Lee Harrison has been employed by UPS since December 4, 1956. On some date prior to 1968, he became a feeder driver at Soto Hub. When he transferred to Santa Barbara, he changed his membership from Local 396 to Local 186, but retained his original feeder driver seniority date.

In November 1971, Charles Buckridge, District Manager of the Metro Los Angeles District and his assistant, Ralph Lipscomb met with Matula and business agent, Lindeman. Buckridge announced that a Santa Barbara run was being eliminated, and:

> . . . . we were putting Mr. Harrison to work in the Soto operation which was in November, that we always have a buildup of feeder drivers in November and the chances were he would be released after the Christmas rush was over.

Harrison was transferred from Santa Barbara to Los Angeles November 22, 1971. Two days later, he was informed by Matula that he had no seniority. Harrison then told the Local 396 steward, Bud Carr, that he wanted to take the matter of his seniority up with the Teamsters Joint Council. Carr answered that Harrison would first have to take it up with Matula and arranged an appointment. Two weeks later, pursuant to this appointment, Matula said:

> . . . . by me coming from Santa Barbara down here that I had no seniority right. . . . He said, "Well, I tell you what, when you become a member of 396, I will fight for you and I and Buckridge will sit down and talk about this.'

On the Soto Feeder Driver Seniority List, posted August 7, 1972, Harrison's name is 38th, and his seniority date is shown as 11-22-71.

On January 12, 1972, the South California District Manager, Joe Aljan, told Cliff Jameson, Secretary-Treasurer of Local 186, that on January 24, 1972, the Company was going to transfer equipment from Santa Barbara to Los Angeles. On January 13, Martin Fry, Business Agent of Local 186 told Aljan that Local 186 did not want to have the equipment transferred until the details were worked out between the Company and the Local. Aljan referred Fry to Buckridge. Fry telephoned Buckridge on January 17. In the course of their conversation, Buckridge stated that, as to the application of seniority, he would do as the local in the area involved requested (in this case, Local 396).

On or about January 17, 1972, Buckridge and Lipscomb met with Matula and Lindeman in Matula's office. Lindeman testified:

> Mr. Buckridge stated that because of economic reasons the Company was going to eliminate all except one of the runs in the Santa Barbara area and that those drivers in the Santa Barbara area whose runs were eliminated were going to be discharged and they probably would take advantage of the new highway going north to supply the northern area from Los Angeles.
>
> At that time Mr. Matula said that he couldn't quite understand the Company's position of discharging the experienced drivers in Santa Barbara with the possibility of hiring new people either out of the package drivers or off of the street to work in Los Angeles.
>
> Mr. Buckridge said that he would take that statement under advisement, but it was my understanding that when he left that office, those fellows were discharged.

Buckridge, describing the same meeting, testified:

> I was under the impression that the contract was clear and we were going to have to release these drivers in Santa Barbara. . . . I gave instructions to our personnel manager to release them. . . . I can't remember the exact wording, but Mr. Matula made a great plea that they were good men and the Company should be able to find some way of working it out to make sure they had jobs . . . I don't recall my exact response, but I said I would look into the matter and do what I could.

Buckridge further testified that he subsequently decided to bring the men to Los Angeles, and informed Matula by telephone. He also testified that Matula "was aware that I was going to put them on the bottom of the [seniority] list" because of the understanding which he had reached with Matula in the case of Harrison in November 1971.

On or about January 18, 1972, Division Manager, Jack Merrill, called a meeting of the Santa Barbara feeder drivers, announced the names of those to be transferred to Los Angeles and told them what runs they would be serving. (The list was posted Friday, January 21.) Merrill stated that, in the matter of seniority, the Company was walking the middle of the road. The drivers had the choice of staying with the Company or quitting. If they stayed with the Company, they would go to Los Angeles with no seniority for the purpose of bidding on feeder paths, or bidding on vacation dates, but would retain Company seniority.

On Monday, January 24, the following feeder drivers were transferred from Santa Barbara to Los Angeles:

Russell Breton
Eugene Saddler
Howard Swain
Dick Jacobs
Bill Cady
Bill Page
John Wetzel

On February 3, 1972, pursuant to Fry's request, there was a meeting of the Teamsters Joint Council 42 in Palm Springs, California. All the local unions party to the UPS contract were represented, with the

single exception of Local 396. Matula, though invited, was absent. The council voted unanimously that

> when a man transfers at the request of the company and takes his work with him, that he should be dovetailed on the seniority list where he is redomiciled,

i.e. that the drivers, above named, should retain their original seniority dates.

On some date during the first week in February 1972, UPS posted at the Soto Hub, the list of feeder paths open for bid, and the seniority list. The names of the Santa Barbara transferees were at the bottom of the list, and all were assigned the seniority date, 1-24-72.

On February 15, 1972, Attorney George Pappy, at the request of Fry, filed a charge with the NLRB alleging that UPS, in violation of Section 8(b)(3) of the Act was refusing to bargain with Local 186 on "the effects on bargaining unit employees of a transfer of operations."

On February 16, 1972, Breton and Saddler met with Matula and Local 396 steward H. (Bud) Carr in Matula's office. Both Breton and Saddler had worked as feeder drivers in Los Angeles before their transfer to Santa Barbara, and both were known to Matula. Saddler had retained his Local 396 membership for a year and a half after the transfer and had joined Local 186, under compulsion, in 1966.

The meeting was described by Saddler and Breton. Neither Matula nor Carr was called as a witness. Ac-

cording to the corroborated, uncontradicted and fully credited testimony of Breton:

> We sat down and talked to Frank Matula and I asked Frank why we weren't getting our seniority.
>
> Frank said, because we are not members of Local 396. I then asked Frank if he was familiar with the Joint Council.
>
> Frank said he was.
>
> I asked Frank if he was invited to a meeting.
>
> He said yes.
>
> I asked him if he went.
>
> He said no.
>
> I asked him why.
>
> He said [in emphatic colloquial language] "I don't have to answer to them. . . . I am a member of the International Trustees."
>
> I then asked Frank if he knew the outcome of the Joint Council meeting in Palm Springs.
>
> He said, no, he didn't.
>
> I informed him that Marty Fry had told me that the Joint Council had met in Palm Springs and agreed unanimously that we were to regain our seniority with full bidding rights and that when this was established the bids were to go in on the board and rebidded.
>
> Frank said he didn't give a damn what they did.
>
> I asked him to give another reason why we weren't getting our seniority.
>
> He stated that we were not members of 396 and he wasn't going to let any of the outlying locals dovetail the seniority in on his boys.

I then said, "The only chance we have is to go to the Labor Board."

He stood up and got very angry.

He said, "If you go to the Labor Board, I will not represent you in my Local. I will refuse your Local dues. Therefore, you will have no representation down here in L.A. County." Then he said, "I don't know why you are getting so mad; you are lucky to have your jobs. The Company wanted to fire you all in Santa Barbara and San Bernardino and hire new men in L.A. . . .

He also stated that the only way we could get our seniority was if the Labor Board was to send a piece of paper and put it on his desk stating that we got our seniority to show the men down at 396 that he had nothing to do with it. . . .

Breton and Saddler went directly from Matula's office to an office of NLRB where a charge alleging violation of 8(b)(1)(A)and (2) by Local 396 was prepared. In the next few days, Breton caused the typewritten charge to be signed by all the feeder drivers named in the complaint (except Dwyer, who was still on sick leave). The charge was filed on February 28, and a copy of the charge was received by Local 396 on March 1, 1972.

Meanwhile, on February 22, Breton's membership (and inferentially the membership of the other complainants) was transferred from Local 186 to Local 396.

About March 1, 1972, Lindeman and Montgomery met at the UPS building on West Olympic Boulevard in Los Angeles. Montgomery testified:

. . . Carl . . . asked me about coming to the Labor Board.

I told him yes, that I had been up there, talked to Miss Jerri Cossack and he asked me why I had come up there.

I told him I had been requested by her to come up and give her certain information, which I did.

He proceeded to tell me I had no business coming up here and that if I were to come up here I should have waited until I was subpoenaed and that at that time I would either turn the subpoena over to him or we would deal with the matter as such. . . .

Lindeman testified that he had received a report that Montgomery had told the Labor Board that Lindeman had been instrumental in getting his seniority back when he was transferred from Costa Mesa to Los Angeles, and

I told Paul that when he made a statement to NLRB it was under the perjury act . . . and that if he went and told them that I was the one that was instrumental in getting his seniority back that that was an untruth and that he could get himself into trouble. I also told him, from the moral standpoint, that there was a disturbance down there amongst the Santa Barbara and San Bernardino drivers and that if they were led to believe that if they came to me that they could get their seniority back, or that I had gotten Paul's seniority back, that that would just create more of a problem than was already there, and I felt that there was enough unrest without that being added to it.

Lindeman denied that he had been instrumental in getting Montgomery's seniority restored, denied express-

ing disapproval of Montgomery's visit to the Board, and denied telling Montgomery that he should have waited for a subpoena.

On March 6, 1972, Local 396 received in the mail the following:

GRIEVANCE REPORT
Package and General Utility Drivers
Local Union No. 396

Name ALL THE UNDERSIGNED

Address .....Home Phone.....

Employed by UNITED PARCEL SERVICE

Whom shall we see? ALL THE UNDERSIGNED

Explain complaint in detail IN ACCORDANCE WITH SEC. II THE COMPANY POSTED BIDS FOR FEEDER DRIVERS IN FEBRUARY 1972.

THE UNDERSIGNED FEEDER DRIVERS WERE DENIED THEIR SENIORITY IN BIDDING THE POSTED RUNS. WE ASK THE COMPANY TO PLACE US ON THE RUNS THAT WE WOULD HAVE BEEN ENTITLED TO, IN ACCORDANCE WITH OUR SENIORITY, WE FURTHER ASK THAT WE BE PAID THE DIFFERENCE IN EARNINGS FROM OUR PRESENT RUNS AND THE RUNS THAT WE WOULD BE ENTITLED TO WITH OUR FULL SENIORITY.

WM. CADY	D. DWYER
WM. PAGE	RUSS BRETON
JOHN WETZEL	GENE SADDLER
ED HARRISON	HOWARD SWAIN
DICK JACOBS	

The "Grievance Report" was signed by all of the persons named therein, with the exception of Dwyer, and it was also signed by James R. Remacle, with the notation, "(3-20-59) Presently working out of Ventura."

About April 1, 1972, Breton telephoned Lindeman. Breton testified:

> I said, "I am calling to find out if you heard anything about the grievance we filed three or four weeks ago."
>
> He said "We are not filing the grievance because you went to the Labor Board. We have it on file and I am waiting to see what the outcome is."
>
> I told him that the reason we filed a grievance was to find out how the company stood in this matter. That's all I remember.

Lindeman's recollection of this conversation differed only slightly from that of Breton. Lindeman testified:

> He asked me what was happening with the grievance that they filed.
>
> I told him that I had filed it in my file and that the Labor Board was going to handle it as far as we were concerned, and that's it.
>
> Q. (By Mr. Pappy) Did you tell him in words or substance that you were not filing the grievance because he went to the NLRB?
>
> A. It was kind of out of context—
>
> Q. Did you say those words in words or substance?
>
> A. No.

On April 12, 1972, the Regional Director dismissed the charge which had been filed by Mr. Pappy on March 15.

On May 17, 1972, Breton filed an amended charge, deleting the allegation that Local 396 had caused UPS to discriminate against the feeder drivers and naming in addition to Local 396, Matula, personally, and all local unions party to the UPS contract as persons "against which the charge is brought."

The feeder driver seniority list posted at the Soto Hub on August 7, 1972, lists 60 names. Harrison and Dwyer are in the 38th and 39th positions with the seniority date 11-22-71. Breton, Cady, Swain, Jacobs, Page, Wetzel and Gilbert,[4] seniority date 1-24-72, occupy positions 40 through 46. Six of the names added to the list with seniority dates later than Gilbert, were package drivers who had worked as feeder drivers during the Christmas rush, November and December 1971.

E. *Concluding Findings*

1. The right of employees to engage in concerted activities guaranteed in Section 7 of the Act and protected by Section 8(b)(1)(A) of the Act includes the "right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." *Miranda Fuel Company, Inc.*, 140 NLRB 181, 185. It includes the right to have grievances handled on their merits by the exclusive bargaining agent. *Independent Metal Workers Union Local No. 1 (Hughes Tool Company)* 147 NLRB 1573. It includes the right of access to the National

[4]Gilbert may have transferred from Santa Barbara or from San Bernardino. He is not named in the complaint.

Labor Relations Board. *Graham Engineering*, 164 NLRB 679, 696.

2. The powers of attorney given to Matula and Local 396 by the other respondent local unions are limited to the negotiation of the collective bargaining agreements and terminate with the execution of each agreement.

3. Each local union administers the contract within the area of its territorial jurisdiction. Each local union prosecutes grievances arising in its locale without any participation by any other local, or any other local agent or representative.

4. No act, omission or statement of Matula is binding on any respondent other than Local 396 and Matula himself.

5. Respondent Local 186, through Fry, vigorously defended the interests of its members, complainants herein. It protested the transfer without prior bargaining and filed a charge of refusal to bargain. A formal grievance would have been futile, in view of Buckridge's statement that UPS would be guided after the transfer by the desires of Local 396. It called a meeting of the Teamsters Joint Council, in a futile effort, to persuade Matula that the transferred drivers should retain their seniority.

6. The complaint, insofar as it alleges unfair labor practices by Local 186, should be dismissed.

7. There is no evidence that any local union other than Local 186 and 396 was requested by any person to take any action. The complaint, insofar as it alleges unfair labor practices by Local Unions 381, 467, 542, 572, 871, 898, 952 and 982, should be dismissed.

8. Prior to the dates when they transferred to Los Angeles, Matula owed no duty to any of the complainants.

9. When Harrison transferred to Los Angeles, November 22, 1971, it became the duty of Matula and Local 396 to give him the same representation which it accorded to all other UPS employees in its territorial jurisdiction.

10. By denying such representation to Harrison because he was not a member of Local 396, Matula and Local 396 violated Section 8(b)(1)(A) of the Act.

11. When Breton and Saddler transferred to Los Angeles on January 24, 1972, it became the duty of Matula and Local 396 to give them the same representation which it accorded to all other UPS employees in its territorial jurisdiction.

12. By denying such representation to Breton and Saddler because they were not members of Local 396, Matula and Local 396 violated Section 8(b)(1)(A) of the Act.

13. By the statement of Matula that Breton and Saddler had lost their seniority because they were not members of Local 396, Matula and Local 396 violated Section 8(b)(1)(A) of the Act.

14. By the statement of Matula that he would deny representation to Breton and Saddler if they invoked the processes of the National Labor Relations Board, Matula and Local 396 violated Section 8(b)(1)(A) of the Act.

15. By the statement of Lindeman that the formal grievance of the complainants herein was not being

processed because they had filed a charge with the Board, Local 396 violated Section 8(b)(1)(A) of the Act.

16. By failing to process the formal grievance of the complainants herein because they had filed a charge with the Board, Local 396 violated Section 8(b)(1)(A) of the Act.

17. By the statement of Lindeman to Montgomery that he should not have given an affidavit to an agent of the Board, Respondent Local 396 violated Section 8(b)(1)(A) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent Local 396 and Respondent Matula, as set forth above, occurring in connection with the operations of United Parcel Service, described above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

It has been found that Respondents Local 396 and Matula have engaged in certain unfair labor practices. It will, therefore, be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Local 396 and Matula are required by statute to give equal, fair and impartial representation to three groups of employees with sharply conflicting interests. These are (1) Feeder drivers with established seniority in the Metro Los Angeles District, (2) Package drivers

in the Metro Los Angeles District who qualify for feeder driver positions and (3) Feeder drivers with established seniority in the South California District who were transferred by UPS to the Metro Los Angeles District. Each group has a plausible seniority claim under the specific terms of the collective bargaining agreement. While the Board may, in passing upon complaints of unfair labor practices, and determining remedies therefor, construe the provisions of collective bargaining contracts,[5] there is here no necessity for the exercise of this function. The gravamen of Respondents' offense is their failure and refusal, for unlawful reasons, to process the grievance of one group of represented employees. This failure can and must be remedied by resort to the arbitration process. I shall, therefore, recommend that the Respondents Matula and Local 396 be ordered to take the grievance of the complainants herein to arbitration. Since the said Respondents have prejudged the case, it will also be recommended that said Respondents be required to furnish the said complainants with reasonable legal fees and to allow them to have their own counsel at the arbitration proceeding.[6] I shall further recommend that the Board retain jurisdiction, in order to reconsider appropriate, affirmative remedial provisions, should those proposed herein prove ineffective.[7]

Conclusions of Law

1. United Parcel Service is an employer within the meaning of Section 2(2) of the Act engaged in com-

---

[5] *N.L.R.B. v. C & C Plywood Corp.* 385 U.S. 421.

[6] *N.L.R.B. v. Local 485 I.U.E.R.M.W.* 454 F.2d 17, 22 (1972).

[7] *Local 485, I.U.E.R.M.W., AFL-CIO (Automotive Plating Corporation)* 170 NLRB 1234, 1235.

merce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Frank Matula is an agent of a labor organization within the meaning of Section 8(b) and Section 2(13) of the Act.

4. By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent Local 396 and Respondent Frank Matula have engaged in unfair labor practices within the meanof Section 8(b)(1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

6. Local Unions 186, 381, 467, 542, 572, 871, 898, 952 and 982, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America have not, nor has any one of them, on this record, engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[8]

---

[8]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order.

Respondents, Local Union 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents and representatives and Respondent Frank Matula, jointly and severally, shall:

1. Cease and desist from:

(a) Restraining or coercing any employee in the exercise of his rights under Section 7 of the Act by refusing or failing to process his grievance because of his non-membership in Local 396 or because of his report to the processes of the Board or for any similar reason.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Proceed promptly to arbitration over the propriety of the seniority dates assigned to feeder drivers, William Cady, William Page, John Wetzel, Eddie Lee Harrison, Dick Jacobs, Dan Dwyer, Russell Breton, Eugene Saddler and Howard Swain by United Parcel Service, upon their transfer from the South California District to the Metro Los Angeles District of United Parcel Service.

(b) Permit the above named feeder drivers to have their own counsel at the arbitration proceeding, and pay the reasonable legal fees of such counsel.

(c) Post at its business offices and meeting halls in Los Angeles, California, and on all Metro Los Angeles UPS bulletin boards reserved for union announcements, including all places where notices to

employees in the bargaining unit are customarily posted, copies of the attached notice marked "Appendix".[9] Copies of said notice, on forms to be furnished by the Regional Director for Region 31, after being duly signed by Frank Matula individually, and as Secretary-Treasurer of Respondent Local 396, shall be posted by them immediately upon receipt thereof, and be maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by said respondents to insure that said notices are not altered, defaced or covered by any other material. Respondents shall also sign copies of the notice which the Regional Director shall make available for posting by United Parcel Service, if it be willing.

(d) Notify the said Regional Director in writing, within 20 days from the date of receipt of this decision, what steps Respondents have taken to comply herewith.[10]

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated:

/s/ George H. O'Brien
George H. O'Brien
Administrative Law Judge

---

[9]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[10]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Excerpt.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [§ 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

29 U.S. 158(B)(1)(A)

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [28 § 2112]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter

a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S. 160(f).

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statute involved 2

Statement 2

A. The Board's findings of fact 2

B. The Board's conclusions and order 7

C. The decision of the court of appeals 9

Argument 10

Conclusion 12

CITATIONS

Case:

Local 12, United Rubber, Workers, 150 NLRB 312, enforced, 368 F. 2d 12, certiorari denied, 389 U.S. 837 11

Statute:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.* 2

Section 8(b)(1)(A) 7

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1126

LOCAL UNION 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 509 F.2d 1075. The Board's decision and order (Pet. App. 8-39) are reported at 203 NLRB No. 799.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1975. The petition for a writ of certiorari was filed on March 8, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, having found that the union had refused to process the grievances of nine employees because they were not members of the union and had filed unfair labor practice charges with the Board, the Board properly ordered the union to submit those grievances to arbitration.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the appendix to the petition (Pet. App. 40-41).

STATEMENT

A. The Board's Findings of Fact

1. United Parcel Service (the Company) delivers packages and merchandise for stores and other businesses. It maintains 22 Package Centers in its Metro Los Angeles District ("Metro District") and 21 Package Centers in its South California District ("South District").[1] Each center serves a specific geographical area. Package drivers operating from each center make pickups and deliveries in panel trucks. (Pet. App. 15.) The Package Centers are supplied from eight feeder driver[2] locations. All feeder drivers serving the Metro District are stationed at the Soto Street Hub. (*Id.* at 16.)

Since at least 1940, the employees in these districts have been represented, in a single bargaining unit, by ten local Teamsters unions, including Local 396 (*id.* at 15). Although they negotiate a single contract, each local union administers the contract and handles grievances within its terri-

[1]Prior to July 1969, both of these districts comprised the single South California District (Pet. App. 15).

[2]Feeder drivers operate heavy-duty highway tractors, pulling two box trailers. Each feeder driver has a regularly prescribed run (feeder path). All have received special training and most have been promoted from the ranks of the package drivers (Pet. App. 16).

torial jurisdiction without the participation of the other locals (*id.* at 19, 33). The jurisdiction of Local 396 corresponds roughly with the Metro District (*id.* at 15).

The 1970-1972 contract provided (*id.* at 4, 16, 18):

> SECTION 11. Feeder Drivers. It is agreed that there shall be a separate seniority list for regular feeder drivers, and those employees presently employed as regular feeder drivers shall retain their seniority in this classification. When additional openings occur in this classification, these may be filled by employees from the bargaining unit who qualify for this work, but these employees shall be placed at the bottom of the feeder driver seniority list. In the event of a reduction in force, feeder drivers may return to their former position and retain their full seniority. Employees desiring to qualify for feeder driver work shall indicate this desire. The names of those employees who are qualified by the Company for feeder driver work shall be placed on a list in seniority order. All vacancies in this classification shall be filled from this list. * * *

The contract also provided the following "rules for bidding" (*id.* at 18):

> Local 396 feeder paths will be posted for bid the first week of February 1971, and the first week of February 1972. The feeder driver with the most seniority shall have the first bid. The feeder driver with the second most seniority shall have the second bid and so forth.
>
> The Company shall have the option of placing a member of 396 on all new feeder paths that may be put on between bidding time. This new feeder path, if still in existence, shall be put on the board at bidding time. Feeder drivers in the outlying areas shall bid for feeder paths in their own area.

For example:

San Diego drivers will bid in San Diego.

Santa Barbara drivers will bid in Santa Barbara and so forth.

The Company will post a Feeder Driver seniority list on the board in each area.[3]

All contracts since 1966 have contained a "Settlement of Controversies" clause, which provides for binding arbitration of any "controversy, dispute or disagreement" in the event that the parties are unable to "settle all differences" (*id.* at 18-19).

7. Eddie Harrison, hired by the Company in 1956, became a feeder driver at the Soto Hub in Los Angeles some time before 1968. During 1968, he was transferred to Santa Barbara, retaining his original feeder driver seniority, and changed his membership from Local 396 to Local 186. In November 1971, Metro District Manager Buckridge informed Frank Matula, secretary-treasurer of Local 396, that the Santa Barbara run was being eliminated and that Harrison was being transferred to Soto as a feeder driver. Shortly after Harrison was transferred back to Los Angeles, Matula told him that he had no seniority there. Thereafter, Harrison told the Local 396 steward that he wanted to take up the matter of his seniority with the Teamsters Joint Council, but the steward said that he first would have to discuss it with Matula. When Harrison again saw Matula two weeks later, Matula reiterated that, having come from Santa Barbara, Harrison had no seniority (*id.* at 22-23). Matula added (*id.* at 23):

---

[3]In prior contracts, one seniority list was maintained for all feeder drivers in the region. No adjustments in seniority were necessary when a feeder driver was transferred from one district to another, or when the driver bid unsuccessfully for any run in the region (Pet. App. 17-18).

> Well, I tell you what, when you become a member of 396, I will fight for you and I and Buckridge will sit down and talk about this.

On the feeder driver seniority list, posted at Soto in August 1972, Harrison's name was 38th and his seniority date was shown as November 22, 1971—the date of his transfer back to Los Angeles (*ibid.*).[4]

3. On January 12, 1972, the Company informed Local 186 that, on January 24, it was to transfer equipment from Santa Barbara to Los Angeles. On January 17, Martin Fry, business agent for Local 186, called Metro District Manager Buckridge regarding the seniority of the transferring drivers, and "Buckridge stated that, as to the application of seniority he would do as the local union in that area involved requested (in this case, Local 396)" (*id.* at 23). On February 3, at the request of Fry, Teamsters Joint Council 42 met in Palm Springs, California, all locals that were parties to the contract being represented except Local 396 (*id.* at 25-26). Those present voted unanimously that (*id.* at 26):

---

[4]Paul Montgomery, who remained a member of Local 396, became a feeder driver in the Soto Hub in Los Angeles on September 16, 1968, and thereafter was transferred to Costa Mesa in the South District. In the spring of 1971 the Company told Montgomery that the point of origin of his run was being moved and that he would no longer have a job. Montgomery protested that under Section 11 of the contract he should revert to his former position as a feeder driver in Los Angeles, and he obtained the assistance of the Local 396 business agent, Carl Lindeman, in effecting his transfer. When Montgomery was transferred back to the Soto Hub, the Company informed him that he would go to the bottom of the seniority list there. Montgomery again obtained Lindeman's assistance, and, when a revised seniority list was posted at Soto, Montgomery was included at about the sixteenth position with a seniority date of September 16, 1968—the date he originally became a feeder driver. (Pet. App. 21-22.)

> when a man transfers at the request of the company and takes his work with him, * * * he should be dovetailed on the seniority list where he is redomiciled.[5]

Meanwhile, on January 24, seven feeder drivers were transferred from Santa Barbara to Los Angeles. Early in February, the Company posted both the list of feeder runs open for bidding and the seniority list at Soto. The Santa Barbara transferees were at the bottom of the seniority list, all being assigned the seniority date of January 24, 1972—the date of their transfer to Los Angeles (*id.* at 25, 26).

On February 16, two of the seven, Russell Breton and Eugene Saddler, met with Matula and Local 396 steward Carr in Matula's office. When Breton asked why they were not getting seniority at Los Angeles, Matula said it was because they "were not members of 396 and he wasn't going to let any of the outlying locals dovetail the seniority in on his boys." (*Id.* at 26-27.) Asked if he was aware of the Joint Council's action in favor of dovetailing, Matula responded that "he didn't give a damn what they did" (*id.* at 27). When Breton suggested that the "only chance we have is to go to the Labor Board," Matula retorted (*id.* at 28):

> If you go to the Labor Board, I will not represent you in my Local. I will refuse your Local dues. Therefore, you will have no representation down here in L.A. County.

Nevertheless, Breton and Saddler filed an unfair labor practice charge with the Board's Regional Office (*id.* at 28).

---

[5] *I.e.*, the drivers should retain their original seniority dates (Pet. App. 26).

On March 6, nine Santa Barbara transferees[6] filed a "grievance report" with Local 396 alleging that they were "denied their seniority in bidding the posted runs," and asking for "full seniority" and back pay (*id.* at 30). About April 1, Breton telephoned Local 396 business agent Carl Lindeman to inquire about the grievance. Lindeman said (*id.* at 31):

> We are not filing the grievance because you went to the Labor Board. We have it on file and I am waiting to see what the outcome is.

B. The Board's Conclusions and Order

The Board found that Local 396 and Matula violated Section 8(b)(1)(A) of the Act by denying Harrison, Breton, and Saddler the same representation the Union accorded other Company employees within its jurisdiction because they were not members of Local 396 (Pet. App. 34). The Board further found that Local 396 violated Section 8(b)(1)(A) by failing to process the formal grievances of the nine Santa Barbara employees because they had filed an unfair labor practice charge against the Union (*id.* at 34-35).

The Board ordered the Union, *inter alia*, to proceed promptly to arbitration over the propriety of the seniority dates assigned to the nine transferred employees, to permit those employees to have their own counsel at the arbitration proceeding, and to pay the reasonable fees of such counsel (*id.* at 10, 38). Concerning the arbitral requirement, the administrative law judge, whose decision was adopted by the Board, explained (*id.* at 35-36; footnotes omitted):

---

[6]Harrison (see pp. 4-5, *supra*), the seven drivers already referred to (see p. 6, *supra*) and Dan Dwyer (Pet. App. 30).

Local 396 and Matula are required by statute to give equal, fair and impartial representation to three groups of employees with sharply conflicting interests. These are (1) Feeder drivers with established seniority in the Metro Los Angeles District, (2) Package drivers in the Metro Los Angeles District who qualify for feeder driver positions and (3) Feeder drivers with established seniority in the South California District who were transferred by UPS to the Metro Los Angeles District. Each group has a plausible seniority claim under the specific terms of the collective bargaining agreement. While the Board may, in passing upon complaints of unfair labor practices, and determining remedies therefor, construe the provisions of collective bargaining contracts, there is here no necessity for the exercise of this function. The gravamen of Respondents' offense is their failure and refusal, for unlawful reasons, to process the grievance of one group of represented employees. This failure can and must be remedied by resort to the arbitration process. I shall, therefore, recommend that the Respondents Matula and Local 396 be ordered to take the grievance of the complainants herein to arbitration. Since the said Respondents have prejudged the case, it will also be recommended that said Respondents be required to furnish the said complainants with reasonable legal fees and to allow them to have their own counsel at the arbitration proceeding.[7]

---

[7]The Board confined this liability to the Union (Pet. App. 9, n. 3).

C. The Decision of the Court of Appeals

The court of appeals upheld the Board's decision and enforced its order, with a modification not here relevant.[8]

The court stated (Pet. App. 3-4):

> [Petitioners'] * * * attack is focused on those portions of the Board's order involving arbitration. They argue that under the terms of the 1970-72 labor agreement, the aggrieved employees have no plausible seniority claim; therefore, the Union's failure to process the grievances was not a breach of its duty of fair representation, and even if the failure were a breach, requiring arbitration of frivolous claims is an unwarranted exercise of the Board's remedial powers.
>
> The crisp disposition of the Union's contentions is that the grievances were not frivolous. The question whether these employees were entitled to be dovetailed turns on the construction and application of some ambiguous provisions of the 1970-72 labor agreement.

Referring to Section 11 of the agreement (p. 3, *supra*), the court added (*id.* at 4-5):

> Transfer of these employees was due to "a reduction in force"; therefore, they "may return to their former position and retain full seniority." The definition of "former position," in the light of the history of the development of seniority

[8]The court of appeals remanded the case to the Board to assess whether the nine employees might properly be represented by para-professionals or a single attorney (*id.* at 7-8). The Board has not challenged the remand.

lists for feeder drivers in the region, and the proper application of the correct standard to the differing employment histories of the drivers are far from clear. The development of multiple feeder driver seniority lists from the single list system, the negotiations preceding the 1970-72 contract, and the conduct of the Company and the Union under the contract [cast serious doubt upon the Union's contention that the contract] unequivocally foreclosed dovetailing of transferred employees. The Board's conclusion that the grievances were plausible is supported by the record.[9]

ARGUMENT

The question posed in the petition (Pet. 2)—whether the Board properly may order arbitration "without an evidentiary finding of probable merit of the grievance"—is not presented on this record. Here the Board found that the grievants' claim that the contract required dovetailing was as plausible as the contrary claim urged by the Union, and the court of appeals upheld the Board's finding as "supported by the record."[10]

In any event, petitioners err in contending (Pet. 5) that, where a union has wrongfully refused to process a grievance, the Board's previous policy has been merely to order the union to consider the grievance.

---

[9]The bracketed language was inadvertently omitted from the reproduction of the opinion in the appendix to the petition.

[10]There is no substance to petitioners' contention that the court of appeals improperly made a finding that the Board had not made by interpreting the contract (Pet. 9). Like the Board, the court merely concluded that the grievants' claim was "plausible," not that it was correct.

Where a union has violated its statutory duty of fair representation in the handling of grievances, the Board has required the union to take the grievances to arbitration where "the record establishes that that step is essential to assure the [employees] * * * an impartial resolution of the merit of their grievances." *Local 12, United Rubber Workers*, 150 NLRB 312, 322, enforced, 368 F. 2d 12, 24-25 (C.A. 5), certiorari denied, 389 U.S. 837. An order requiring arbitration was particularly appropriate here in light of the Board's finding that the Union had "prejudged the case" (p. 8, *supra*) and the fact that the contractual "settlement of controversies" clause provides no formal grievance machinery except arbitration.[11]

---

[11]In relevant part, the clause reads (Pet App. 18-19, G.C. Exh. 4, p. 26):

> Should a controversy, dispute or disagreement arise during the period of this Agreement, there shall be no cessation or stoppage of work authorized by the Union, and the Union will do its utmost to see that work is continued in a normal and orderly way, and said controversy, dispute or disagreement shall be adjusted in the following manner: each of the parties shall make an earnest attempt to settle all differences, but in the event they fail to settle such differences a Board of Arbitration shall be appointed consisting of two (2) representatives of each party hereto and an additional member who shall be a disinterested party to be selected by the representatives of the parties hereto. The majority decision of such Board shall be final, binding and conclusive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

MAY 1975.